A **AZMAN MAHMOOD & ANOR**

v.

SJ SECURITIES SDN BHD

B FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ZULKEFLI MAKINUDIN CJ (MALAYA)
AHMAD MAAROP FCJ
HASAN LAH FCJ
C ZALEHA ZAHARI FCJ
[CIVIL APPEAL NO: 02( )-75-11/2011(W)]
3 AUGUST 2012

D ***CIVIL PROCEDURE:*** *Appeal - Interference by appellate court - Trading in shares - Unauthorised transactions - Intervention on finding of facts - Evaluation of facts and evidence - Findings based on written admission - Whether there was misdirection by trial judge in arriving at conclusion*

E ***CIVIL PROCEDURE:*** *Estoppel - Delay - Essence of estoppel - Whether delay can create estoppel - Whether estoppel can be applied to create liability*

F ***SECURITIES:*** *Stockbroker - Duties and obligations - Negligence - Unauthorised dealings in client's shares by employee - Liability - Whether stockbriker liable for losses suffered by client*

The plaintiff was a stock broking company. In November 1993 and February 1994, the first and second defendants opened trading accounts, respectively, to trade shares on the Kuala G Lumpur Stock Exhchange ('KLSE'). As an individual and the director of the second defendant's company, the first defendant was the authorised person to deal with both accounts. One Megat acted as the dealer for the defendants' accounts. In November 1996, the first defendant discovered unauthorised trade of shares. H Megat promised to regularise the accounts but a statement which was later issued revealed that this was not done. Subsequently, the first defendant lodged a complaint to the plaintiff's executive director through a meeting. This was followed by a written complaint. The plaintiff replied stating that the complaint was I unsubstantiated and claimed for the recovery of losses from the share transactions. On the other hand, the defendant counterclaimed for, *inter alia*, the return of the proceeds in the

accounts that were set off earlier and losses arising from the plaintiff's negligence. The High Court dismissed the plaintiff's claim and allowed the defendant's counterclaim in part. However, the decision was reversed by the Court of Appeal. The Court of Appeal apparently drew a conclusion based on inferences that the transactions carried out were authorised and that the defendants had knowledge of those transactions. Aggrieved, the defendants appealed. The issues to be determined by this court were: (i) whether the trial judge had misdirected herself based on the evaluation of facts and evidence in arriving at her decision; (ii) whether this court could intervene on the findings of fact made by the courts below; and (iii) whether estoppel can properly be applied to create liability.

Held (allowing appeal with costs; reinstating orders of High Court)

Per Raus Sharif PCA delivering the judgment of the court:

(1) The law on appellate intervention on findings of fact by a trial judge is trite. (*Multar Masngud v. Lim Kim Chet and Anor*). Proper inferences must be drawn based on all evidences fairly admitted by the parties. The plaintiff's submission that there was an agreement between Megat and the defendants in carrying out the unauthorised transactions was misplaced. There was a clear misdirection by the Court of Appeal as the material evidence showed that the transactions were unauthorised. Therefore, the finding of the High Court judge in invoking adverse inference under s. 114(g) of the Evidence Act 1950 against the plaintiff was upheld. (paras 24, 26 & 27)

(2) The court was unable to accept the plaintiff's contentions that the defendants failed to object or question the unauthorised transactions as undisputed facts clearly show that the defendants were not quiet when they knew of the unauthorised transactions in their trading account. Further, it was testified that Megat was dismissed for manipulating the accounts without the first defendant's knowledge. (paras 27 & 28)

(3) The very essence of an estoppel had not been satisfied. The plaintiff failed to demonstrate on how the delay in replying to their contra statements as early as the year 1996 had encouraged a belief on their part and having relied on that belief the plaintiff had altered their position. No time frame

had been set out to actually impose liability on the defendants for delay. The delay issue was a matter to be treated with severity only in appropriate circumstances but it was not enough to create an estoppel for the plaintiff. (para 29)

(4) The plaintiff had failed to prove their loss and the defendants in turn had shown that the plaintiff was negligent to allow Megat to misuse the accounts. In order to satisfy its obligation, a brokerage firm must show not only that they had supervisory and compliance rules and procedures in place but also that they had effectively implemented and enforced those rules and procedures. There were unauthorised transactions in the defendant's accounts. Shifting the burden and imposing liability on an innocent trader by reason of unauthorised transactions conducted by their employees will cause substantial harm to the innocent trader. (paras 31-32)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif merupakan sebuah syarikat broker saham. Pada bulan November 1993 dan Februari 1994, defendan pertama dan kedua telah membuka akaun dagangan, masing-masing, untuk memperdagangkan saham di Bursa Saham Kuala Lumpur ('BSKL'). Sebagai seorang individu dan pengarah syarikat defendan kedua, defendan pertama telah diberikan kuasa untuk berurusan dengan kedua-dua akaun. Satu Megat telah bertindak menguruskan akaun-akaun kedua-dua defendan. Pada bulan November 1996, defendan pertama mendapati bahawa terdapat perdagangan saham tanpa kebenaran. Megat berjanji untuk merombak akaun-akaun tersebut tetapi kenyataan yang kemudiannya dikeluarkan mendedahkan bahawa perkara ini tidak dilakukan. Defendan pertama kemudiannya membuat aduan kepada pengarah eksekutif plaintif melalui mesyuarat. Ini diikuti dengan aduan bertulis. Plaintif membalas dengan menyatakan bahawa aduan tersebut tidak berasas dan menuntut untuk mendapatkan semula kerugian daripada urus niaga saham. Sebaliknya, defendan menuntut balas, antara lain, pulangan hasil dalam akaun yang telah ditolak dan kerugian yang timbul akibat kecuaian plaintif. Mahkamah Tinggi menolak tuntutan plaintif dan telah membenarkan sebahagian daripada tuntutan balas defendan. Walau bagaimanapun, Mahkamah Rayuan telah mengakas keputusan tersebut. Mahkamah Rayuan menyimpulkan berdasarkan pada inferens-inferens bahawa transaksi-transaksi yang dijalankan telah dibenarkan dan bahawa defendan mempunyai pengetahuan akan transaksi-transaksi

tersebut. Terkilan, defendan kemudiannya merayu. Isu-isu yang perlu diputuskan oleh mahkamah ini adalah: (i) sama ada hakim bicara telah salah arah berdasarkan penilaian fakta dan bukti dalam membuat keputusan beliau; (ii) sama ada mahkamah ini boleh campur tangan dalam dapatan fakta yang dibuat oleh mahkamah-mahkamah di bawah; dan (iii) sama ada estopel boleh diguna pakai untuk mewujudkan liabiliti.

Diputuskan (membenarkan rayuan dengan kos; menghidupkan semula perintah Mahkamah Tinggi)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Undang-undang campur tangan rayuan mengenai dapatan fakta oleh hakim bicara adalah nyata. (*Multar Masngud v. Lim Kim Chet and Anor)*. Kesimpulan yang betul mesti dibuat berdasarkan semua bukti-bukti diperakui oleh pihak-pihak. Hujahan plaintif bahawa terdapat perjanjian antara Megat dan defendan dalam menjalankan transaksi-transaksi yang tidak dibenarkan tidak kena pada tempatnya. Jelas bahawa terdapat salah arah oleh Mahkamah Rayuan kerana bukti menunjukkan bahawa urusniaga-urusniaga tersebut tidak dibenarkan. Oleh itu, dapatan hakim Mahkamah Tinggi dalam mengguna pakai inferens bertentangan di bawah s. 114(g) Akta Keterangan 1950 terhadap plaintif dibenarkan.

(2) Mahkamah tidak dapat menerima hujahan plaintif bahawa defendan gagal untuk membantah atau mempersoalkan urus niaga-urusniaga tanpa kebenaran kerana fakta tidak dipertikaikan jelas menunjukkan bahawa defendan tidak mendiamkan diri apabila mereka mendapat tahu mengenai terdapatnya transaksi-transaksi yang tidak dibenarkan dalam akaun dagangan mereka. Selain itu, terdapat keterangan bahawa Megat telah dipecat kerana memanipulasi akaun tanpa pengetahuan defendan pertama.

(3) Intipati estopel tidak dipenuhi. Plaintif gagal untuk menunjukkan bagaimana kelewatan membalas kepada penyata kontra mereka seawal tahun 1996 telah menggalakkan kepercayaan di pihak mereka dan bahawa dengan bergantung kepada kepercayaan itu plaintif telah mengubah kedudukan mereka. Tempoh masa tidak dinyatakan untuk menjadikan defendan-defendan bertanggungan bagi kelewatan. Isu

kelewatan adalah satu perkara yang hanya perlu dilihat dengan teliti dalam keadaan yang sesuai tetapi ia tidak cukup untuk mewujudkan estopel bagi plaintif.

(4) Plaintif gagal membuktikan kerugian mereka dan defendan pula berjaya menunjukkan bahawa plaintif cuai dalam membenarkan Megat menyalahgunakan akaun-akaun tersebut. Dalam usaha untuk memenuhi obligasi, sesebuah firma broker mesti menunjukkan bahawa mereka bukan sahaja mempunyai penyeliaan dan pematuhan peraturan dan prosedur tetapi juga bahawa mereka telah melaksanakannya secara berkesan dan menguatkuasakan peraturan-peraturan dan prosedur. Terdapat transaksi-transaksi yang tidak dibenarkan dalam akaun defendan. Memindahkan beban dan mengenakan tanggungan tersebut ke atas peniaga yang tidak bersalah oleh sebab urus niaga tanpa kebenaran yang dijalankan oleh pekerja mereka akan membawa kemudaratan besar kepada peniaga yang tidak bersalah tersebut.

Case(s) referred to:

Attorney-General of Hong Kong and Another v. Humphreys Estate (Queen's Gardens) Ltd [1987] 1 AC 114 ***(refd)***

Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 1 LNS 40 PC ***(refd)***

Dato' Shazryl Eskay Abdullah v. Meron Mahawangsa Sdn Bhd & Dato' Yahya A Jalil [2011] MLJU ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Greenwood v. Martins Bank, Limited [1932] AC 51 ***(refd)***

Inter-Pacific Securities SB v. Fong Ping Yuen [1999] 1 LNS 206 HC ***(refd)***

Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(refd)***

M'Kenzie (Pauper) v. British Linen Company [1881] AC 82 ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phao Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Montagu Stanley and Company v. JC Solomon, Limited [1932] 2 KBD 287 ***(refd)***

Multar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 FC ***(refd)***

Nationwide Building Society v. Lewis [1998] Ch 482 ***(refd)***

RHB Cathay Securities Pte Ltd v. Ibrahim Khan and Other Actions [1999] 3 SLR 464 ***(refd)***

Sarawak Securities Sdn Bhd v. Andy Chan Chaw Guan; Fabian Eh Ng (Third Party) [2000] 7 CLJ 364 HC ***(refd)***

Sundram Ramasamy v. Arujunan Arumugam & Anor [1994] 4 CLJ 300 SC ***(refd)***

Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)

For the appellant - Lambert Rasa-Ratnam (Moh Kok Wai, Mong Chung Seng & Bella Chu with him); M/s Moh Kok Wai
For the respondent - Harjinder Kaur (Rizal Zulkeply & Yau Her Lerk with her); M/s Rizal & Co

[Appeal from Court of Appeal; Civil Appeal No: W-02-752-2007]

Reported by Najib Tamby

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This is an appeal by the appellants against the decision of the Court of Appeal on the 16 November 2010,, in allowing the respondent's appeal against the High Court decision. Leave to appeal was granted by this court on 2 November 2011 and the questions of law framed for determination in this appeal are:

> Question 1
>
> Whether an inference based on policy can properly be drawn to hold a customer liable for an admittedly unauthorized share transaction, because he did not immediately lodge a complaint with the firm of stock-brokers;
>
> Question 2
>
> Whether estoppel can properly be applied to create liability, on the ground it was not immediately notified, for a transaction that is admittedly unauthorized although no inducement, reliance or alteration of position by the delay is shown;
>
> Question 3
>
> Whether a customer can properly be held liable on his indemnity for losses alleged to have resulted from a transaction, although the loss claimed has not been proved.

[2] The appellants are the defendants and the respondent is the plaintiff. For convenience, parties will be referred to as the plaintiff and defendants as in the trial court.

A **Background Facts**

[3] The facts which form the background of this appeal can be briefly set out as follows.

B **[4]** The plaintiff in this action is a stock broking company and a member of the Kuala Lumpur Stock Exchange. In November 1993 and February 1994, the 1st and 2nd defendants opened trading accounts (accounts) respectively with the plaintiff to trade shares on the Kuala Lumpur Stock Exchange. The 1st defendant as an individual and the director for the 2nd defendant company was C the person authorised to deal with his and the 2nd defendant's account.

[5] The accounts are governed by the terms set out in the plaintiff's standard account application form which include *inter alia* D as follows:

(a) The defendants undertake to abide by the Rules and Regulations of the Kuala Lumpur Stock Exchange relating to purchase and sale of shares listed with the bourse;

E

(b) The defendants undertake to make immediate payment for the delivery of stocks and/or shares purchased on their behalf;

(c) The defendants undertake to promptly deliver to the plaintiff any the shares sold on their behalf;

F

(d) The defendants authorise the plaintiff to deal with the shared purchased for the account of the defendants, which has not been paid for, in any way deemed fit by the plaintiff;

G (e) The defendants undertake to indemnify the plaintiff against all losses resulting from the failure of the defendants in complying with the covenant as stipulated in the agreement.

[6] The initial dealer assigned by the plaintiff for the defendants' accounts was Baharum Mohd Amin. In or around October 1995, H the plaintiff assigned another employee known as Megat Makbtar ("Megat") as the dealer for the accounts.

[7] In November 1996, the defendants received contra-statements issued by the plaintiff. The 1st defendant found that I shares were being traded in the accounts in an unauthorised manner. The 1st defendant contacted Megat, to which Megat promised to regularize the accounts. However by a notice dated

January 1997 the plaintiff's Credit Control Department had issued a notice to the defendants concerning the outstanding sums. The statement showed the Accounts had not been regularized and losses were incurred. As a result of this, the plaintiff in turn had force sold the shares that were purchased and used the proceeds to set off the losses.

[8] The 1st defendant on 24 February 1997 met with the Executive Director of the plaintiff complaining on the unauthorised transactions. On 27 February 1997 the 1st defendant made a written complaint stating their position as to the unauthorized transaction in their accounts and requested for suspension of the accounts.

[9] The plaintiff replied through their solicitors *via* two letters both dated 12 December 1997 to the defendants stating that the complaint made was unsubstantiated and further demanded payment for the contra losses. In furtherance to this, the defendants replied through their solicitors *via* letter dated 13 February 1998 enclosing two purported letters from the Megat to the Board of Directors of the plaintiff acknowledging that the unauthorised transactions were carried out without the approval of the defendants.

[10] In consequence of this, the plaintiff, dismissed Megat from his employment for misconduct on 22 April 1998. The dismissal was in tandem with the findings of a domestic inquiry conducted by the plaintiff that found Megat guilty of misusing the defendants' accounts which resulted in the losses.

[11] Notwithstanding the above, the plaintiff commenced this action against the 1st and 2nd defendant on 16 July 1998 and 17 July 1998 respectively, for recovery of losses from the share transactions.

[12] The particulars of the plaintiff's claim reflected that defendants' accounts suffered losses amounting to RM846,092.13 which include contra loss totalling RM694,493.66. In respect of the 2nd defendants' account the contra loss totalled at RM26,767.35.

[13] The defendants in turn counterclaimed for, *inter alia*, the return of the proceeds in the accounts that were set off earlier to recover the losses as a result of the share transactions, and losses arising from plaintiff's negligence in handling and managing their accounts.

[14] The two actions commenced by the plaintiff were subsequently consolidated.

The High Court

[15] On 26 June 2007, the High Court, after full trial, dismissed the plaintiff's claim and allowed the defendants counterclaim in part. In doing so the learned judge held *inter alia* that:

(a) PW1 and the other two witnesses (PW2 and PW3) who testified were viewed as witnesses who did not have knowledge of the transaction in the accounts. PW1 testified that the contract notes and the contra statements contained errors and material differences which could not be explained by them.

(b) Megat (DW1) had caused the losses in the defendants' accounts as a result of the said share transactions being made without the defendants' knowledge. This was fortified by his own testimony in court and confession in writing (exh. "P38") and *via* statutory declaration (exhs. "D62" and "D63"). Megat admitted that he used the defendants' accounts without instructions by way of a "married deal". Megat also admitted in writing (exhs. "D60" and "D61") that he would indemnify the defendants' losses in the trading accounts.

(c) The plaintiff failed to produce the fax transmission or phone recording for the transaction in dispute. That being the case an adverse presumption under s. 114(g) of the Evidence Act 1950 was invoked against the plaintiff.

(d) The plaintiff was negligent in allowing Megat to misuse the accounts; and the defendants had proved their counterclaim that the plaintiff had force sold the shares in their accounts and utilised the proceeds to set off the losses incurred from the share transactions.

Court Of Appeal

[16] Aggrieved by the High Court decision the plaintiff appealed and the Court of Appeal unanimously allowed the appeal on 16 November 2010 and set aside the judgment of the High Court and entered judgment for the plaintiff with costs. The Court of Appeal held the following:

(a) The losses suffered in the trading accounts were apparent. Whether the losses were contra losses or whether the transactions were "married deals" are immaterial as the defendants had contractually agreed to indemnify the plaintiff against all losses.

(b) The defendants contention that Megat (DW1) acted without the 1st defendant's instruction or knowledge to be disingenuous. Megat's testimony (referring to Megat Makthar's Q & A No. 57, 58 and 59) clearly shows that the 1st defendant (DW2) had knowledge of the said share transactions. The defendants' own evidence clearly shows that they had agreed for the trades to be booked under 'their accounts. The defendants had knowledge of the transactions but remained silent and did not take any action. Hence, the undeniable inference that can be drawn is that the defendants are therefore estopped from denying the transactions.

(c) Since records such as the contract notes and statement of accounts were issued independent of the dealer, the unauthorised trades could not remain hidden and would be discovered by the account holder eventually. Having discovered the evidence of such rogue trade at a later date, the account holder was expected to take up a complaint with the plaintiff as required by the agreement. Their failure to do so further endorses the fact that there was a private arrangement between Megat and the defendants to allow Megat to use their account.

(d) The plaintiff's contractual rights to be indemnified for all losses against the defendants remained intact. Reference was made to the case of *Multar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237 FC; *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626 CA; *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40 PC and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC.

(e) Traders are deemed to have, accepted and ratified rogue trades and trading on their trading accounts if they did not lodge a complaint with whosoever has authority over such trader.

Submissions

[16] Before us, learned counsel for the defendants submitted that the Court of Appeal drew a wrong inference based on the evidence recorded that the transactions which were conducted by DW1 was authorised. The Court of Appeal also drew a wrong inference that the defendants had knowledge of the transactions and in the interim had accepted the transactions. To this, learned counsel submitted that there was direct evidence adduced during the trial on the issue that the transactions were not authorised by the defendants and Megat had manipulated the accounts. The defendants counsel submitted that whether an inference could properly be drawn in any given matter was a question of fact based on evidence, not policy. The defendants counsel further submits that the inference drawn by the Court of Appeal based on policy was wrong. In support thereof the defendants counsel referred to the case of *Sundram Ramasamy v. Arujunan Arumugam & Anor*, SC [1994] 4 CLJ 300.

[17] The defendants counsel further submitted that the undisputed evidence clearly showed that the defendants did not remain silent on the unauthorised transactions. The learned counsel vehemently argued that the Court of Appeal was wrong in holding that the defendants were indeed silent and they are therefore estopped from denying the unauthorised transactions. The learned counsel submitted that the defendant did inform the plaintiff, *albeit* at a later date. He submitted that there was an explanation for the delay and delay *per se* did not create estoppel. He submitted that the plaintiff must prove that the delay created had encouraged a belief (on the part of the plaintiff) that the transactions were authorised and the plaintiff relied on that belief or encouragement and as a result of this reliance, the plaintiff altered its position. The learned counsel for the defendants have studiously taken us through some of the relevant cases which include *Attorney-General of Hong Kong and Another v. Humphreys Estate (Queen's Gardens) Ltd* [1987] 1 AC 114, PC; *Nationwide Building Society v. Lewis*, CA [1998] Ch 482.

[18] As for the issue of loss and indemnity, the learned counsel for the defendants submitted that the plaintiff had plainly failed to prove the loss it claimed. It was manifestly demonstrated before the trial judge that the plaintiff's witnesses were unable to explain the obvious material errors and discrepancies in the contract notes

and contra statements. In amplification of this the learned counsel submitted that the plaintiff had no cause of action against the defendants on the indemnity. On this point the learned counsel submitted the case of *Montagu Stanley and Company v. JC Solomon, Limited*, CA [1932] 2 KBD 287.

[19] The learned counsel for the plaintiff conversely submitted that where an account holder of a stock broking trading account had agreed to be liable for losses suffered in their trading account, the account holder's failure to object or question the unauthorised transactions would constitute an estoppel at law which precluded the account holder from relying on a defence that the transaction was not authorised. The plaintiff counsel referred to us to plethora of authorities in support of his contentions and this included the cases of *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; *RHB Cathay Securities Pte Ltd v. Ibrahim Khan and Other Actions* [1999] 3 SLR 464; *Inter-Pacific Securities SB v. Fong Ping Yuen* [1999] 1 LNS 206; *Sarawak Securities Sdn Bhd v. Andy Chan Chaw Guan; Fabian Eh Ng (Third Party)* [2000] 7 CLJ 364.

[20] It was also argued before us by the plaintiff's counsel that the evidence in this case revealed that the defendants were actually aware and condoned the said share transactions as opposed to merely being ignorant of it. The plaintiff's counsel referred us to the case of *M'Kenzie (Pauper) v. British Linen Company* [1881] AC 82.

[21] The learned counsel for the plaintiff further went on to state that the Court of Appeal was correct in using policy to infer liability on a customer of a stock broking firm when the said customer failed to immediately lodge a complaint to the stock broking firm upon knowledge of an unauthorised transaction done by the stock broking firm's dealer. The plaintiff counsel stressed that public policy may be used to impose liability when it was fair, just and reasonable to do so and where failure, to rely on public policy may cause injury to the public welfare or interest. In reliance thereof the following cases were cited: *Dato' Shazryl Eskay Abdullah v. Meron Mahawangsa Sdn Bhd & Dato' Yahya A Jalil* [2011] MLJU; *Majlis Perbandaran Ampang Jaya v. Steven Phao Cheng Loon & Ors* [2006] 2 CLJ 1.

[22] As for the issue of indemnity the plaintiff's counsel submitted that the defendants' failure to lodge the complaint immediately after coming to know of the unauthorized transactions had resulted in the plaintiff being induced, and further relying on the conduct of the defendants they did suffer losses. The plaintiff counsel placed heavy reliance on the cases of *Greenwood v. Martins Bank, Limited* [1932] AC 51; *Yoong Sze Fatt, RHB-Cathay Securities Pte Ltd (supra)*, *Inter-Pacific Securities SB and Sarawak Securities Sdn Bhd (supra)*.

Findings

[23] The questions of law raised in this appeal rests upon the issue of whether the learned trial judge had misdirected herself based on the evaluation of facts and evidence in arriving at her decision, It also raised the issue of appellate intervention on findings of facts by the learned trial judge.

[24] The law on appellate intervention on findings of fact by a trial judge is trite. In this context it may be useful to refer to the case of *Multar Masngud v. Lim Kim Chet and Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237 FC, wherein it was held that an appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded. In the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40 it was held that when a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error results in serious injustice. In *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC, the Federal Court echoed the following:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This

> is reflected in the Court of Appeal's restatement that a Judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.

[25] It is clear to us that the Court of Appeal in this instance was fully aware of the above principle the court drew strength from the abovementioned pronouncements. Having given this matter their utmost consideration and having anxiously scrutinized the record, the Court of Appeal stated the following:

> We find the argument that Megat Makhtar acted alone without the defendants' instruction or knowledge to be disingenuous ...
>
> In this case, Megat Makthar testified for the defendants and therefore it is the defendants' own evidence that the defendants agreed that the trades be booked under the defendants' Accounts. The arrangement was purely between Megat Makhtar and the defendants.

Based on the foregoing, the Court of Appeal concluded that:

> Having examined the process of evaluation by the learned trial Judge, we find that the learned Judge did not fully appreciate the evidence before her.

[26] The question before us now is whether appellate intervention is permissible in this case. We would like to emphasise here that this is not a case that involves pure questions of fact founded upon the credibility of witnesses. Rather, it is a case where proper inferences must be drawn based on all evidences fairly admitted by the parties. Having said that we are convinced that as far as evidence goes the learned trial judge took pains to set forth in her judgment to show that there was indeed inconsistency and manifest error in the purported contract notes relating to the unauthorized transactions. It is pertinent to note that this was not only supported by documentary evidence but also further substantiated by the testimonies of the plaintiff's witnesses. The plaintiff's witness, namely, PW1 confirmed that there were material inconsistencies and errors in the contra statements and contract notes. The learned judge based her findings on documentary

A evidence produced before her namely exh. "P38", "D62" and "D63" which were admission in writing by Megat to say that he used the defendants' account without instructions by way of a "married deal". We therefore find that the plaintiff's submission that there was an agreement between Megat and the defendants B in carrying out the unauthorized transaction to be misplaced in light of the direct evidence being adduced. We hereby uphold the finding of the learned High Court judge in invoking an adverse inference against the plaintiff under s. 114(g) of the Evidence Act 1950 in respect of the plaintiff's failure to tender the fax C transmission or telephone recording for the purported transaction which is in dispute.

[27] We are unable to endorse the finding of the Court of Appeal in ruling that the defendants had knowledge of the D unauthorized transactions. This is a clear misdirection on the part of the Court of Appeal as the material evidence recorded clearly shows that the transactions were unauthorized. Our attention was drawn to the notes of proceedings before the learned trial judge and we noticed the following portion of the Megat's Q & A which E actually strengthens our stand:

> Q57: Rujuk ms 97, Lampiran 44 (Eskhibit P-41). Anda telah mengatakan semasa Domestic Inquiry bahawa "When the Account was utilised in the first place, it was profitable. This was done with Dato's knowledge". Sila terangkan F maksud pernyataan anda ini samada ia telah dilakukan atas arahan Dato' Azman.
>
> A: Saya pohon izin Yang Arif Hakim untuk menerangkannya dalam Bahasa Inggeris. It was done without Dato' Azman's instruction. I bought and sold the shares first G in my Clearing Account which resulted in profits. So I approached Dato' Azman and asked him whether I can book the profits under his account which he agreed. Dato' only knew about this profitable transaction after the shares have been bought and sold, not before.
>
> H Q58: Seterusnya, anda telah mengatakan semasa Domestic Inquiry bahawa "Subsequently, the account incurred losses, also with Dato's knowledge". Sila terangkan maksud pernyataan anda ini samada is telah dilakukan atas arahan Dato' Azman.

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A: No, it was done without Dato's instruction. The buy and sell of shares in this case have been done and booked into Dato's account without Dato's instruction or knowledge. Dato' knew about this when there were losses in his account and complained to me about it.

Q59: Rujuk kepada soalan semasa Domestic Inquiry "Does the client know about his own trades and losses in the Account? Dan jawapan anda "Yes, up to a certain extent when the losses amounted approximately RM45K. Sila terangkan maksud pernyataan anda ini samada is telah dilakukan atas arahan Dato' Azman.

A: Yes, Dato' knew about the losses in the account but the transaction was not done with his instruction or approval. Dato' demanded that I rectify the situation.

Based on the above, it is clear from the testimony of Megat that the transactions were not authorized by the defendants and he had in fact manipulated the Accounts.

Further, we would also like to highlight the testimony of SP1, wherein SP1 in her Q & A stated that:

Q105: Benarkah Megat Makhtar telah dipecat dari jawatanya pada 22 April 1998 oleh plaintiff?

A: Yes, based on the record.

Q107: Saya katakan kepada kamu bahawa Megat telah didakwa atas salahlaku yang serius berdasarkan pengakuan beliau bahawa transaksi yang menyebabkan kerugian dalam akaun (Yak) Azman dan Fine Access telah dilakukanya tanpa sebarang kebenaran,

A: Yes.

It is clear to us that SP1's testimony fortifies the fact that Megat was dismissed by the plaintiff from his employment for having manipulated the Accounts without the 1st defendant's knowledge.

[28] We are also unable to accept the plaintiff's contentions that the defendants failed to object or question the unauthorised transactions as undisputed facts clearly show that the defendants were not quiet when they knew of the unauthorised transactions in their trading account. The undisputed facts reveal that the

A 1st defendant had indeed met up with the Executive Director of the plaintiff on 24 February 1997 and wrote a letter on 27 February 1997 stating their position on the irregularities in their accounts.

B To substantiate the above contention we would like to make reference to the relevant undisputed evidence which had crystallized through the testimony of Dato Azman (DW2) at Q & A No 20-23:

C Q20: Setelah mengetahui kerugian kontra yang amat banyak pada akhir Januari 1997 adakah kamu membuat tindakan susulan dengan plaintiff?

A: Saya terus berjumpa dengan Pengarah Eksekutif plaintiff pada 24 February 1997 untuk memaklumkan beliau mengenai urusniaga tidak sah yang telah dijalankan dalam akaun saya dan akaun Fine Access.

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Q21: Apa berlaku seterusnya?.

A: Selepas pertemuan itu, saya susuli dengan surat kepada Pengarah Eksekutif Plaintiff.

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Q22: Rujuk ms 67 dan 68, Lampiran 44 (Ekshibit P-34), adakah ini surat yang dimaksudkan.

A: Ya.

F In similar breath, Dato Azman took pains to explain the contents of the purported letter at Q & A No 23 as the following:

Q23: Bolehkah anda beritahu Mahkamah kandungan surat anda?

G A: Saya mengadu bahawa kedua-dua akaun saya dan Fine Access telah disalahgunakan. Saya juga melampirkan senarai urusniaga yang dibuat tanpa arahan saya. Saya juga mengatakan bahawa hasil jualan daripada urusniaga yang sah telah digunakan untuk menyelesaikan kerugian urusniaga yang dibuat tanpa arahan saya.

H Thus, based on the testimony of Dato Azman (DW2); and, substantiated with documentary evidence tendered in court, it is evident that Dato Azman did infact react to the unauthorised transactions.

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[29] As for the issue of estoppel, we are of the view that the plaintiff has failed to demonstrate to this court on how the delay in replying to their contra statements as early as year 1996 had encouraged a belief on their part and having relied on that belief the plaintiff had altered their position. To us it is clear that the very essence of an estoppel as envisaged in the case of *Attorney General of Hong Kong And Anor v. Humphrays Estate (Queens Gardens) Ltd* [1987] 1 AC 114, PC has not been satisfied. Moreover it is pertinent to note that the important provision in the plaintiffs contract note stipulate that:

> Any error must be notified to us by registered letter immediately

We are of the view that based on the clear provisions of the contract note, no time frame had been set out to actually impose the liability on the defendants for delay. Hence we are entirely conscious that the issue of delay in this case is a matter to be treated with severity only in appropriate circumstances. If there was a delay it was adequately explained by the 1st defendant that he was away overseas from October 1996 to January 1997. Hence, we find delay *per se* was not enough to create an estoppel in favour of the plaintiff.

[30] To recapitulate, based on the facts and evidence adduced at trial it is clear that there was an unauthorized transaction in the defendants' accounts. We are convinced that after considering the rival contentions of the parties both evidential and by way of argument, the learned trial judge made the abovementioned findings. It is apparent that the learned trial judge did in fact properly evaluate the evidence and asked herself the right questions.

[31] Based on the forgoing we are convinced that the plaintiff had failed to prove their loss, and the defendants in turn had shown that the plaintiff was negligent to allow Megat to misuse the accounts. As a result of this, the defendants suffered losses when the plaintiff force sold the shares in the defendants' accounts and utilised the profits to set off the losses incurred from the unauthorised transactions.

[32] In conclusion, may we add that in order to satisfy its obligations, a brokerage firm must show not only that they had in place supervisory and compliance rules and procedure but also

A that they had effectively implemented and enforced their rules and procedures. Shifting the burden and imposing liability on the innocent trader by reason of unauthorised transactions conducted by their employees will cause substantial harm to the innocent trader. We however say this with caution; save, to the very limited
B extent to which we have indicated, as this clearly depends on the surrounding facts and circumstances of a particular case.

[33] Based on the forgoing reasons, we will answer all the three questions posed to us in the negative. Accordingly the appeal is
C allowed with costs. The orders of the Court of Appeal are therefore set-aside. We reinstate the orders of the High Court. We will now invite counsel to address us on the issue of costs.

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